No. 84-4 (6)

IN THE
SUPREME COURT OF
THE UNITED STATES

OCTOBER TERM, 1984

WILLIAMSON COUNTY REGIONAL PLANNING COMMISSION, et al.,

Petitioners,

v.

HAMILTON BANK OF JOHNSON CITY,

Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF OF THE CITY OF NEW YORK AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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INTEREST OF THE AMICUS CURIAE

On a daily basis, the municipal government of the City of New York makes countless discretionary decisions affecting how New Yorkers utilize the land within the boundaries of this City. In

particular, City commissions regularly exercise their police power with respect to specific parcels of property through zoning, historic district regulation, and landmark preservation. Accordingly, the City of New York is very much concerned about the practical implications of the Court of Appeals' reasoning in this matter.

The holding of the Court of Appeals for the Sixth Circuit would expand the liability of local and municipal governments by exposing them to money judgments where an owner's beneficial use of property is found to be so restricted as to constitute a taking. The propriety of compensation as a remedy in such cases is an issue which affects both urban and rural communities, inasmuch as exposure to money judgments for land-use regulations enacted in good faith, but later deemed confiscatory, would impede the exercise of discretionary governmental power in matters of vital public interest.

This brief is submitted pursuant to Rule 36.4 of the rules of this Court in support of petitioners' request for reversal.

ARGUMENT

ASSUMING, ARGUENDO, THAT A LAND-USE REGULATION IS INVALIDATED ON CONSTITUTIONAL GROUNDS, THE PROPERTY OWNER IS NOT ENTITLED TO A MONEY JUDGMENT FOR DAMAGES CAUSED BY THE ENACTMENT AND FINANCIAL LIABILITY SHOULD NOT BE IMPOSED ON THE LOCAL GOVERNMENT.

In the instant case, the Court of Appeals would permit damages to be awarded for a temporary "taking" by a regional planning commission, which, acting in good faith and after affording the developer full procedural due process, enforced certain lawfully-enacted zoning ordinances. This holding is premised on a broad reading of the Just Compensation Clause of the Fifth Amendment.*

In recent terms, this Court has had several opportunities to consider the impact of local

*"[N]or shall private property be taken for public use, without just compensation." This Fifth Amendment prohibition is applicable to the states through the Fourteenth Amendment. See Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 US 155, 160 (1980).

ordinances imposing restrictions on an owner's use of his property. See, e.g., Loretto v. Teleprompter Manhattan CATV Corp., 458 US 419 (1982); San Diego Gas & Electric Co. v. City of San Diego, 450 US 621 (1981); Agins v. City of Tiburon, 447 US 255 (1980). However, none of these decisions squarely addressed the issue of the kind of relief to be awarded where the use of property has been restricted without a physical invasion of the property and the owner has not been deprived of all reasonable use of the property.

In essence, the Circuit Court has held that compensation is payable herein because the local government denied the landowner the most beneficial use of his property. This, we submit, falls far short of a "taking" within the meaning of the Just Compensation Clause. Nevertheless, assuming, arguendo, that the land-use regulations in question are unreasonable, an injunction and a declaratory judgment would be the usual forms of relief. These remedies have been considered fully adequate in prior federal and state actions successfully

challenging the constitutionality of regulations enacted pursuant to the police power. See, e.g., Urbanizadora Versalles, Inc. v. Rivera Rios, 701 F.2d 993 (1st Cir., 1983); Eck v. City of Bismarck, 283 NW2d 193, 201-02 (N.D. Sup. Ct., 1979); Gold Run, Ltd. v. Board of County Commissioners, 554 P2d 317, 319 (Colo. Ct. App., 1976).

In New York, as in other states, landowners who have been adversely affected by a municipal determination have the right to seek expeditious judicial review. For example, under Article 78 of the Civil Practice Law and Rules, a New York property owner may institute a summary proceeding challenging the determination of any public body or officer affecting him. Where warranted, injunctive relief and a declaratory judgment with respect to the challenged act or regulation may be granted.

The approach followed by the New York courts is exemplified by Fred F. French Investing Company, Inc. v. City of New York, 39 NY2d 587, 350 NE2d 381, cert. denied, 429 US 990 (1976). The

French case dealt with an amendment to the New York City Zoning Resolution by which the Tudor City parks were rezoned for the use of the public. Although the New York Court of Appeals found this zoning amendment unconstitutional, it was not treated as a "taking." The Court held that, in all but exceptional cases, an unreasonable regulation of the use of private property will not compel the payment of compensation. Instead, such a regulation will be treated as a denial of due process and invalidated. Id., 39 NY2d at 593-95, 350 NE2d at 384-86. Thus, the property owner challenging a land-use regulation has no viable cause of action for an "inverse taking" under New York law, but he can obtain declaratory and injunctive relief.*

*In contrast to the usual condemnation proceeding, in which the government, in the exercise of its power of eminent domain, takes action to condemn property for a public purpose, some jurisdictions permit a landowner to institute an "inverse condemnation" suit, seeking compensation for the "taking" of property where no formal condemnation proceeding has been commenced. See Agins v. City of Tiburon, 447 US 255, 258, n. 2 (1980); United States v. Clarke, 445 US 253, 255-58 (1980).

In French, the Court of Appeals failed to reach the issue of whether an illegal exercise of discretionary governmental power could provide the basis for an award of damages, finding that this issue was not properly before the Court. Id., 39 NY2d at 599, 350 NE2d at 388-89. Although the plaintiffs sought review in this Court of the denial of compensation, their appeal was dismissed and certiorari was denied. 429 US 990 (1976).

Thereafter, this Court had another opportunity to consider a property owner's entitlement to compensation in the event of invalidation of a police power regulation. See Penn Central Transportation Co. v. New York City, 438 US 104 (1978), aff'g, 42 NY2d 324, 366 NE2d 1271 (1977). The City argued in Penn Central that even if the Landmarks Law were invalid, the owners were in no event entitled to damages or compensation.* This Court ultimately concluded that there had been no "taking" of property by the City. Id., 438 US at 138.

*See Appellees' Brief at 37-39.

In so holding, this Court noted that a land-use regulation cannot be deemed confiscatory merely because it impairs an owner's full beneficial use of his property (id. at 131):

> [T]he decisions sustaining other land-use regulations, which, like the New York City law, are reasonably related to the promotion of the general welfare, uniformly reject the proposition that diminution in property value, standing alone, can establish a "taking," see Euclid v. Ambler Realty Co., 272 U.S. 365 (1926) (75% diminution in value caused by zoning law); Hadacheck v. Sebastian, 239 U.S. 394 (1915) (87 1/2% diminution in value); cf. Eastlake v. Forest City Enterprises, Inc., 426 U.S., at 674, n. 8 . . . .

See also Agins v. City of Tiburon, supra, 447 US at 260-62; Andrus v. Allard, 444 US 51, 66 (1979).

Here, the Circuit Court concluded that the land retained no significant economically viable use and went far beyond merely invalidating the county's enactments as unconstitutional. By providing for the award of compensation, it has raised the specter of liability for money judgments whenever the police power is used to restrict land

use in an innovative way. This Court has previously recognized the "State's broad power to impose appropriate restrictions upon an owner's use of his property." Loretto, supra, 458 US at 441 (emphasis in original). See also Schad v. Borough of Mount Ephraim, supra, 452 US 61, 68 (1981). To expose counties and municipalities to liability in damages for discretionary determinations made in the exercise of that broad power would seriously impede vital governmental functions.

Given the number of areas in which local governments must take action, the scope of liability suggested by the Circuit Court may well be unlimited. Yet, it is essential that local governments have the capacity to act in good faith, on an emergency basis and without undue interference with the decision-making process. While it is argued that damages may have some deterrent effect where municipalities are considering clearly unconstitutional measures, the possibility of such awards could also lead to stagnation. Local officers may deem the status quo

safer than any untested measures, however beneficial they might prove to the public as a whole.

We find most troubling the Circuit Court's suggestion that there could be a compensable taking in the absence of any vested right on the part of the landowner to finish its development (729 F2d at 407). "[I]nterference with investment-backed expectations" is but one factor to be considered in assessing the economic impact of a regulation under the Takings Clause. Loretto, supra, 458 US at 426. Ordinarily, fluctuations in value during the process of governmental decisionmaking are considered "incidents of ownership." See Agins v. City of Tiburon, supra, 447 US at 263, n. 9.

In his dissenting opinion in San Diego Gas, supra, 450 US at 656-57, Justice Brennan suggested that it would only be "fair" for the public to pay "just compensation" in order to place the landowner affected by an invalid regulation in the same position he would otherwise have occupied. To hold that someone who invests capital in real property can recover losses occasioned by the application of

land-use regulations to his property would effect a fundamental shift in the allocation of risk in capital ventures. The local government and its taxpayers cannot assume the burden of making disappointed landowners whole. As this Court noted in Andrus v. Allard, supra, government regulation often "curtails some potential for the use or economic exploitation of private property. To require compensation in all such circumstances would effectively compel the government to regulate by purchase." 444 US at 65 (emphasis in original).

A cogent statement against the award of compensation to owners of property affected by invalid municipal zoning ordinances was made in Veling v. Borough of Ramsey, 94 NJ Sup. 459, 228 A2d 873 (1967). In holding that no cause of action to recover damages could be maintained against a municipality, the Court took note of the adverse effect exposure to damages would have on municipal functions and on the public fisc (id., 228 A2d at 874):

> The power of a municipality to adopt zoning regulations pursuant to statutory authority is an essential aspect of the police power. The governing body must be free to exercise that power in good faith to amend or alter its zoning regulations when it determines the public interest requires. To hold otherwise would saddle municipalities with oppressive financial burdens and litigation which would seriously impair, if not nullify, their power to perform a vital governmental function.

Accord, HFH, Ltd. v. Superior Court of Los Angeles County, 125 Cal. Reptr. 365, 542 P2d 237, 242-43 (1975), cert. denied, 425 US 904 (1976); Superior Uptown Inc. v. City of Cleveland, 39 Ohio St. 2d 36, 313 NE2d 820 (1974); Mailman Development Corp. v. City of Hollywood, 286 So.2d 614, 615 (Dist. Ct. App. Fla., 1973), cert. denied, 293 So.2d 717 (Sup. Ct., Fla.), cert. denied, 419 US 844 (1974) (all holding that no cause of action for money damages could be maintained against a municipality for the diminution in value of land resulting from the application of invalid zoning ordinances).

Similarly, the Supreme Court of North Dakota declined to award damages where there had been a

reduction in the market value of property through zoning. In Eck v. City of Bismarck, supra, 283 NW2d at 200-01, the Court found that municipal liability in damages for the effects of unconstitutional land-use regulations would have grave consequences:

> We agree that the potential consequences of an action for inverse condemnation militate against its availability to challenge the constitutionality of governmental regulation. If actions for inverse condemnation loom in the future, land-use planning might be stymied, the fiscal-budgetary process chaotic, and the financial burdens on the community staggering. Most important, authorization of such an action would enable North Dakota courts to sit as legislative bodies doling out the State and local fisc.

See also Brabham v. City of Sumter, 275 So. C. 597, 274 SE2d 297 (S.C. Sup. Ct., 1981); Mountain Medical, Inc. v. City of Colorado Springs, 43 Colo. A. 391, 608 P.2d 821 (Colo. Ct. App., 1979); Davis v. Pima County, 121 Ariz. 343, 590 P2 459 (Ct. App., 1978); State of Washington v. Pacesetter Construction Co., Inc., 89 Wash. 2d 203, 571 P2d 196 (Sup. Ct., 1977); Joyce v. City of Portland, 24 Ore.

A. 689, 546 P2d 1100 (Ore. Ct. App., 1976) (all holding that a property owner has no entitlement to money damages from the state or local government for losses occasioned by changes in zoning).

For all the above reasons, we urge this Court to find that there has been no official action interfering with respondent's use of the land sufficient to constitute a compensable taking.

CONCLUSION

The judgment of the Court of Appeals should be reversed.

November 14, 1984.

Respectfully submitted,

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